

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 25, 2007 Session

**STATE OF TENNESSEE v. MITCHELL RICHARDSON, JOHN TRAVIS
RICHARDSON, APRIL C. RICHARDSON, AND AMBER CAMPBELL**

**Appeal from the Circuit Court for Bledsoe County
No. 57-2004 Thomas W. Graham, Judge**

No. E2006-01580-CCA-R3-CD - Filed May 13, 2008

A Bledsoe County Circuit Court jury convicted the defendants Mitchell Richardson and John Travis Richardson of aggravated assault, a Class C felony, and the defendants April C. Richardson and Amber Campbell of assault, a Class A misdemeanor. Mitchell Richardson and John Travis Richardson were sentenced to serve four years and six months in the Department of Correction, and April C. Richardson and Amber Campbell were sentenced to serve ten months, with ten days to be served in jail and the remainder on probation. In this direct appeal, all defendants raise issues regarding denials of a severance and mistrial regarding admission of evidence of an out-of-court statement of Amber Campbell and sentencing. In addition, Mitchell Richardson, April C. Richardson, and Amber Campbell challenge the sufficiency of the evidence. Upon review, we affirm the convictions but modify the length of the sentences of Mitchell Richardson and John Travis Richardson based upon State v. Gomez, 239 S.W.3d 733 (Tenn. 2007). We affirm the sentences of all defendants with respect to the trial court's imposition of confinement.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part,
Sentences of Defendants Mitchell Richardson and John Travis Richardson Modified**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

L. Thomas Austin and Jennifer Austin Mitchell, Dunlap, Tennessee, for the appellants, Mitchell Richardson, April C. Richardson, and Amber Campbell.

Elizabeth Greer Adams, Dunlap, Tennessee, for the appellant, John Travis Richardson.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; James Michael Taylor, District Attorney General; and Will Dunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case involves the beating of Charles Swafford by the four defendants. The evidence established that the victim suffered significant injuries when he was attacked outside the home of defendants Mitchell Richardson and April C. Richardson, where he had been taken by John Travis Richardson.

At the trial, Jeremy Labay testified that on the evening of April 20, 2004, he was with Dustin Watson and Aaron Jones when they saw the victim leaning over his truck outside McBay's auction house. He described the victim as being covered in blood, having pieces of bone sticking out of his lip and nose, and having lost control of his bodily functions. He said the victim was locked out of his truck and needed medical care but refused for them to call an ambulance. He and his companions ran into the road to stop Ryan Angel, a member of the Rescue Squad. Labay said they were able to convince the victim to travel to the hospital emergency room in Angel's truck. Labay went to the hospital and stayed until the victim was taken by Life Force to another hospital about an hour and a half or two hours after his arrival.

Dustin Watson and David Aaron Jones testified that they were riding around town with Jeremy Labay when they saw the injured victim at McBay's. Their testimony was in accord with Labay's regarding the victim's hesitancy to seek medical treatment and their role in obtaining assistance for the victim. Jones testified that he had seen the victim at about 3:00 or 4:00 p.m. that day and that the victim did not appear intoxicated.

Ryan Angel testified that he was employed as an emergency medical technician. He recalled having seen the injured victim at 6:00 or 7:00 p.m. on the evening of April 20, 2004, and said the victim did not appear intoxicated. He said that later that evening around midnight, three men had flagged him down near McBay's. He said the victim was bleeding from his head near his eye, had a broken nose with visible bone, possibly bilateral jaw fractures, and had lost control of his bodily functions. He said he took the victim to the hospital after the victim refused to go in an ambulance. He said that the victim appeared to be in a lot of pain and that the victim rated his pain a "200" on a scale of one to ten. Angel said he stayed at the emergency room with the victim until the Life Force helicopter came. He said that the victim first said he had fallen but that the victim later reported at the emergency room that the people who had injured him told the victim that they would kill him if he identified them.

The victim's medical records were admitted by stipulation. Mr. Angel was questioned about terminology used and statements made in the records. He said that an acute fracture of the nasal bone would be a "[p]retty serious fracture." He said that a person with injuries like the victim's would normally be given Morphine or Demerol for pain. He said the victim's medical records reflected that the victim had Amphetamine, Barbiturates, Benzopine, Cannabis, and Opiates in his system. He said the records reflected that the victim had been uncooperative in giving the history of his injuries and that the victim had stated he fell twenty to thirty feet onto rocks. He said it was

not unusual for a patient with a head injury to be uncooperative in giving his history. Mr. Angel said the victim had a life-threatening loss of blood.

Chris Rice testified that he was a Pikeville police officer and that he arrived at the hospital emergency room at 12:55 a.m. on April 21, 2004, where he encountered the badly injured victim. He said the victim reported that he had fallen off a cliff and “that they would kill him.” Officer Rice said he had taken a statement from John Travis Richardson at 7:15 p.m. on April 21, in which Richardson said he had seen the victim the previous evening at Pikeville Pawn Shop and had gone “mudding” with the victim, Adam Ferguson, Adam Newby, and two girls. Officer Rice said Richardson stated that the group came back into town and that the victim “said he was going to some girl’s house to get some” and that the victim was walking toward his truck as Richardson drove away.

Randall Swafford testified that he was the victim’s father. He said he was called to the emergency room, where he found the victim beaten unconscious and barely recognizable. He said that he later went to Erlanger Hospital, where the victim had been taken, and that the victim was “hollering and carrying on” as the medical personnel were “picking bones out” of the victim’s nose.

Shirley Hixson testified that she was the victim’s aunt. She went to Erlanger Hospital with her brother, Randall Swafford, and the victim’s sister. She was present when a surgeon took bones from the victim’s nose and inserted plastic into it. She said that the victim was uncomfortable and had to be sedated during the procedure and that he was still uncomfortable after the sedation.

Winna Swafford testified that the victim was her brother and that she went to Erlanger Hospital with her father and aunt to see the victim. She said the victim was moaning and screaming as the medical personnel worked on him. She said he had cuts on his eyes and blood pouring from his eyes and ears. She saw something that looked like bone being removed from the victim’s nose. She said the victim was released from the hospital the following evening and that he was scheduled for plastic surgery at a later date. She described the victim as being “slower” to understand things and “off balance a little” after the injuries. She said he had a scar over his right eye from the incident, which had reopened recently when he had a four-wheeler wreck, and a scar across his nose where his nose had sunken, which still required plastic surgery to correct. She said plastic had been placed in the victim’s nose to hold its shape. Ms. Swafford identified photographs of the victim taken the day he came home from the hospital and photographs taken later.

Kenneth Lawrence testified that he was with Elizabeth Nichols a few days after the victim’s injuries occurred and that he was present when Amber Campbell was talking to Nichols about the victim’s injuries. He said Campbell stated that she beat and kicked the victim.

Sharon Carmack testified that she was Amber Campbell’s mother and April Richardson’s former stepmother and that she had known the victim for a couple of years. She said she and the victim were friends and that he stayed at her house on occasion, sleeping on the couch. She denied that she had allowed her then-fifteen-year-old daughter and the victim to sleep together in her house.

She said she received a telephone call around 11:30 p.m. or midnight on the night the victim was beaten. She recognized the victim's voice begging "[f]or who had him down to let him up." She recognized Mitchell Richardson's voice telling the victim "that if one cop pulled up that he would drive him off the side of the mountain, and they – the cops around here would just think he was drunk again." She also heard Mitchell Richardson tell another person to let the victim up because he had had enough.

Elizabeth Nichols testified that the victim, Amber Campbell, and April Richardson were all friends of hers. She said that on the morning after the victim had been attacked, April Richardson admitted to her that she had kicked the victim while he was down and spit on him. She said that a few days later, she talked to Amber Campbell in the presence of Kenneth Lawrence. She said Amber Campbell reported that she had kicked and spit on the victim while he was down.

The victim, Charles Swafford, testified that he was twenty-four years old and had known April Richardson since high school. Before April 2004, he had known Amber Campbell for a couple of years. Before April 2004, he was acquainted with John Travis Richardson, but they were not friends. He did not know Mitchell Richardson before April 2004.

The victim testified that on the evening he was assaulted, he was in town and was talking to some friends. He said, "Amber pulled in and she started fussing at me about something." He said that he could not understand exactly why Amber Campbell was upset but that it concerned a rumor she had heard. He denied that the rumor was about Amber's fifteen-year-old sister. He said he told Campbell to call him. He said that after Campbell left, he and Aaron Jones had dinner at Scottie's, "rode around for a few minutes," and then encountered John Travis Richardson and Adam Ferguson. He said they were being friendly to him and invited him to go riding around with them on the mountain. He went in John Richardson's Jeep Cherokee with Richardson, Ferguson, "Carmen and her younger sister," and a male whose name he did not know. He said they went to Clifty, rode through a creek, left the car and talked and joked, and drank beer. He said they dropped off the younger girl at home and returned to town to ride around. Eventually everyone but the victim and Richardson left the Jeep. The two rode through town some more and then parked at a business. Amber Campbell pulled in and talked to John Richardson, but the victim did not pay attention to their conversation. Campbell gave Richardson a "pop kiss" before they left. He said they drove through town a couple more times until Richardson said he wanted to go to the valley to get something. The victim said he expressed his desire to go home, but Richardson said it would not take long.

The victim testified that John Richardson drove to the home of Mitchell and April Richardson. He said there were three other vehicles in the driveway, which he recognized as belonging to Mitchell Richardson, April Richardson, and Amber Campbell. He said that John Richardson insisted that the victim come inside with him and that as soon as he stepped out of the truck, Mitchell Richardson hit him in the nose with a hard object like a bat or pool stick. He said he was also hit in the back of the head with a hard object. He said the first blow broke his nose and that he "was out of it from there on . . . getting beat back and forth ever which way." He said he was

assaulted by all of the defendants when he was down on the ground. He said he was kicked in the ribs, spit on, hit in the head with fists and objects, and hit across the back with an object. He specifically recalled April Richardson and Amber Campbell kicking him in the ribs and spitting on him and John Richardson hitting him in the face. He said April Richardson held a telephone over his head during the beating. He said he begged the defendants to stop beating him and told them to get a gun and “end it” if they were not going to stop beating him. He said Mitchell Richardson eventually made John Richardson stop beating him. He said the beating was so severe that he lost control of his bodily functions and “was bleeding like crazy.”

The victim testified that Mitchell Richardson took him back to his truck and warned him as they traveled that he would be killed if “a cop pulled up in [Mitchell Richardson’s] driveway.” He said Mitchell Richardson did not take him to the hospital but left him at his truck. He said his truck was locked, even though he never locked it himself. He said he tried to get in through the back window until the people who later took him to the emergency room found him. He said that he was too scared to admit what had happened at first and that he initially reported at both hospitals that he had fallen on some rocks.

The victim testified that the treatment he received for his nose at Erlanger was very painful. He said pieces of bone were removed and plastic was inserted into his nose and still remained. He said that they applied glue to injuries around his eyes, nose, eyebrows, and lips and that they stitched a cut inside his mouth. He said that he needed plastic surgery because his nose was starting to “cave in” but that he had not been able to have the surgery due to a lapse in his insurance coverage. He said he had difficulty breathing and headaches since the beating.

The victim testified that he was living with his father at the time of the assault. He denied that he had ever stayed overnight at Sharon Carmack’s home.

The victim testified that he had taken three Xanax pills on April 20, which he said were prescribed to him for anxiety attacks. He later said he took two Xanax pills that day. He admitted that he had used marijuana before the attack but denied that he had used it on the day of the attack. He denied having used amphetamines or barbiturates. He said he had never used methamphetamine. He said he had taken pain medication for a toothache sometime before the attack, but he could not recall when. He denied that he had offered pills to his companions when they were riding around on the mountain. The victim denied that he had refused Mitchell Richardson’s offer to call 9-1-1 after the beating because the victim had pills and marijuana in his possession. He acknowledged that his medical records included the notation “polysubstance abuse,” and he said he had been given medication in the emergency room. The victim admitted that he had recently been in “rehab” but stated that it was for anxiety and panic attacks, rather than drug abuse. He denied that he had been the first aggressor and had attacked Mitchell Richardson. He admitted that his medical records did not contain a notation of an injury to the back of his head. He acknowledged that he had been injured in March or April of 2005 in a four-wheeler wreck and had reinjured a cut on his eye.

The victim testified that he never knew why the beating had happened. He said, however, that Mitchell Richardson “said that I had been screwing his wife and that I was going to pay for it.” He denied that this was true and that Mitchell Richardson asked him to leave.

Doug Roberson testified that he was the lead investigator in the case. He said he was present as John Travis Richardson was being released from jail and overheard Richardson say “he would have killed the son of a b----.” Investigator Roberson acknowledged on cross-examination that the side effects of methamphetamine include paranoia and aggressiveness.

Mel Matthews testified that he was present at the jail when John Travis Richardson was being released. He overheard Richardson say “that if someone hadn’t pulled me off of him I’d killed [sic] the son of a b----.”

Adam Ferguson testified for the defense that he saw the victim in the Maytag parking lot around 3:00 or 4:00 p.m. on April 20, 2004. He said the victim was drinking Bud Light. He said that at about 6:00 p.m., the victim got into John Travis Richardson’s car. Ferguson said that he, Richardson, Adam Newby, Carmen Pheiffer, and Tara Pheiffer were already in the car. He said that they went to “Clifty river” and that the victim drank more than a twelve-pack of beer by himself. He said that he saw the victim with a cellophane wrapper from a pack of cigarettes full of methamphetamine, “Xanax bars,” and “pot,” and that the victim offered him and the girls some of the drugs. He said the victim took ten to twenty Xanaxes. He said the victim had a “cocky attitude” and challenged the other males to arm wrestle with him. He said that at about 9:00 p.m., everyone got out of John Richardson’s car except Richardson and the victim. He said that he and John Richardson were friends but that he did not know Mitchell Richardson as well.

Mitchell Richardson testified that on April 20, 2004, he was married to April Richardson. He said he had four children. He identified Amber Campbell as his ex-wife’s half-sister and said Campbell was staying at the Richardson home on April 20. He said she had arrived home sometime after the rest of the family that evening. He said that at about 10:30 p.m., Amber Campbell had gone outside to get something out of her car and came back inside and told him that his brother and a person she thought was Charlie Swafford were outside. He said he did not know the victim personally but had heard of him. He said he went outside and told the victim that he had heard about him and that he was not welcome. He said the victim asked what was wrong and questioned why he had to leave. He said he informed the victim that he did not want someone who had been sleeping with a fifteen-year-old around his house because he had an eleven-year-old daughter. He said the victim was loud and vulgar and started toward him. He said that the victim “rares back” and that he responded by doing the same, swinging, and hitting the victim. He said he felt threatened by the victim. He said they went to the ground and that the fight was over after “a couple of punches.” Richardson said that he backed up and said he was going to call the authorities. He said he heard something behind him and turned to see his brother, John, on top of the victim telling the victim to lie down and be still. He said that his brother was not hitting or kicking the victim and that the victim was going to attack him as he was walking away but had been subdued by his brother. He said that he made another statement about calling the authorities and that the victim immediately

became apologetic and asked that he not call the authorities. He said the victim pulled pills and marijuana from his pockets and said his father would kill him. He said the victim asked to be taken back to his truck. He said that because his brother had been drinking, he took the victim back to his truck. He said that on the way to the victim's truck, the victim apologized and thanked him for not calling the authorities. He said the victim never requested medical assistance. He said that during the altercations he and his brother had with the victim, neither April Richardson nor Amber Campbell kicked, hit, or spit on the victim. He denied that he had hit the victim with anything other than his hand. However, he admitted he had hit the victim hard.

Mitchell Richardson testified that he had never been convicted of a felony or been in any trouble. He said he had worked for TVA for fourteen years. He said his security clearance was affected by the present charge.

Cathy Reed testified that she was Sharon Carmack's sister and Amber Campbell's aunt. She said she knew but was not related to April Richardson. She recalled having been at Carmack's house in 2004 and having seen both the victim and Ms. Carmack's fifteen-year-old daughter spending the night there. She said Ms. Carmack told her the victim and the fifteen-year-old were in a bedroom together watching television. She said Ms. Carmack and Amber Campbell do not have a relationship and that Campbell had been raised by Reed's parents. She said that she did not trust Ms. Carmack and that Ms. Carmack took too much medication.

After receiving the evidence, the jury found the defendants guilty of the charged offenses. This appeal followed.

I

The defendants Mitchell Richardson, April C. Richardson, and Amber Campbell challenge the sufficiency of the evidence. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

As relevant to this case, the statutes provide:

Assault. – (a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

T.C.A. § 39-13-101(a)(1).

Aggravated Assault. – (a) A person commits aggravated assault who:

- (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and:
 - (A) Causes serious bodily injury to another[.]

T.C.A. § 39-13-102(a)(1)(A). “Serious bodily injury” is defined in our code as “bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a bodily function.” T.C.A. § 39-11-106(a)(34).

Defendant Mitchell Richardson was convicted of aggravated assault. In the light most favorable to the state, the evidence demonstrates that this defendant struck the victim in the face with a hard object, breaking his nose. He participated in the subsequent beating of the victim, which included hitting, kicking, and spitting on the victim. The evidence also demonstrates that the victim was at risk of death from blood loss after the attack, that he suffered extreme physical pain from his injuries, that he had scars on his face from the beating, and that a portion of his nose was collapsing and required plastic surgery. This evidence is sufficient to support Mitchell Richardson’s aggravated assault conviction.

Defendants April Richardson and Amber Campbell were convicted of assault. In the light most favorable to the state, the evidence shows that both of these defendants kicked and spit on the victim during the attack. This evidence supports assault convictions for these defendants.

In so holding, we reject the argument of these three defendants that the victim was acting aggressively and the argument of Mitchell Richardson that he responded in self-defense after the victim’s actions threatened him. These arguments invite us to reweigh the evidence and draw our own conclusions. As we noted, though, this is the province of the jury, which we may not invade upon appellate review. See Sheffield, 676 S.W.2d at 547; Cabbage, 571 S.W.2d at 835.

II

All four defendants claim the trial court erred in failing to sever their cases from those of their co-defendants and in failing to grant a mistrial. These complaints arise from the trial court’s admission of inculpatory statements of April Richardson and Amber Campbell, which the defendants claim were in violation of Bruton v. United States, 391 U.S. 123 (1968).

In a hearing held outside the presence of the jury, the state advised the trial court that it planned to call Kenneth Lawrence and Elizabeth Nichols to testify about a statement by defendant Amber Campbell that implicated all four defendants. The trial court ordered that evidence of the statement be limited to Amber Campbell’s admissions of her own inculpatory actions and that the witnesses be instructed not to testify about Campbell’s statement insofar as it was inculpatory of the

other three defendants. The court also instructed that the evidence of April Richardson's statement be similarly limited if her statement was inculpatory of anyone other than herself.

In the presence of the jury, the state presented the testimony of Kenneth Lawrence. The state questioned the witness about what he heard Amber Campbell say about the beating of the victim. Despite the admonitions given to the witness before his testimony, he said, "She – she said that they beat Charlie." The defense objected, and the court asked the witness to restate what Campbell had said she did. The witness responded, "Well, she told me that she beat Charlie and kicked him when he was down on the ground." A bench conference immediately followed, at which the court acknowledged that the witness' statement was "unfortunate" but denied a mistrial. The court commented, "I don't know to the extent that there was just a mumble about they, but there was no complete sentence." The court also noted, "I don't think – this jury's not going to decide this case based on a word that's not connected to a sentence. They're either going to – it's going to go up or down on whether they believe . . . that this event happened." Counsel for the defendants then moved for severance, which the court denied.

Elizabeth Nichols testified about her conversations with defendants April Richardson and Amber Campbell. She limited her testimony to the statements these two defendants made about their individual culpability for the offense.

Before the state rested, counsel for the defendants again moved for a severance and a mistrial based upon the testimony of Kenneth Lawrence that Amber Campbell had said "they" had beaten the defendant. The court denied the motions.

Severance

Bruton prohibits the use of a statement of a non-testifying co-defendant which incriminates the defendant. Bruton, 391 U.S. 123; see State v. Ogle, 666 S.W.2d 58, 60 (Tenn. 1984). Rule 14 of the Rules of Criminal Procedure addresses the procedure to be followed when a Bruton issue arises. At the time of the defendants' trial, Rule 14 provided in pertinent part:

(c) Severance of Defendants.

(1) If a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to the defendant but is not admissible against the defendant, the court shall determine whether the State intends to offer the statement in evidence at trial. If so, the court shall require the prosecuting attorney to elect one of the following courses:

(i) a joint trial at which the statement is not admitted into evidence or at which, if admitted, the statement would not constitute error; or

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, if, as deleted, the confession will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

Tenn. R. Crim. P. 14(c)(1), (i)-(iii) (2004).¹ The Committee Comment to the Rule states:

Severance of defendant is covered in section (c), dealing with the Bruton issue. Bruton v. United States, 391 U.S. 123 (1968). Subdivision (c)(1)(i) and (ii) contain provisions making severance unnecessary where no Bruton violation would follow, as would be true, for example, where the confessing co-defendant testifies or where redaction eliminates any prejudice to the non-confessing co-defendant.

The decision whether to grant a severance lies within the sound discretion of the trial court. State v. Meeks, 867 S.W.2d 361, 369 (Tenn. Crim. App. 1993); State v. Coleman, 619 S.W.2d 112, 116 (Tenn. 1981). Thus, we review this issue for abuse of discretion. See State v. Shirley, 6 S.W.3d 243, 246-47 (Tenn. 1999) (adopting abuse of discretion review for cases involving severance of offenses). In determining whether the trial court has abused its discretion in denying a defendant's motion for severance from his or her co-defendants, "[t]he record must demonstrate that 'the defendant was clearly prejudiced to the point that the trial court's discretion ended and the granting of [a] severance became a judicial duty,' before an accused is entitled to a reversal of his conviction." Id. (quoting State v. Burton, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988) (citations omitted in Burton)).

In the present case, the trial court properly limited the evidence to exclude any reference in the statement of Amber Campbell which was inculpatory to her co-defendants. The problem arose when Kenneth Lawrence's testimony did not conform with the trial court's ruling.

First, we note that defendant Amber Campbell has no basis for a severance because the statement in question was her own. Neither Bruton nor Rule 14 prohibits admission of a defendant's own statement in a criminal prosecution against that defendant. Thus, Amber Campbell was not entitled to severance or a mistrial on the basis of Kenneth Lawrence's testimony about Campbell's statement.

We turn to the claim of error made by the remaining defendants. The state contends that Kenneth Lawrence's testimony about Amber Campbell's statement that "they" had beaten the

¹The Rules of Criminal Procedure have been reformatted, but the substantive provisions regarding severance of defendants remain the same. See Tenn. R. App. P. 14(c)(1)(A)-(C).

defendant did not run afoul of Bruton because it did not expressly implicate the remaining defendants and was inculpatory of them only via the consideration of other evidence of the co-defendants' involvement in the crime. We are not persuaded. Although Lawrence's testimony did not identify "they," there was no contention at trial that the crime had been committed by individuals other than the defendants. Following Kenneth Lawrence's testimony, the state presented evidence that April Richardson admitted kicking and spitting on the victim, and Mitchell Richardson testified during the defense case-in-chief that he struck the victim and that John Travis Richardson knocked the victim to the ground. We reject the state's contention that the Richardson defendants were not implicated by Lawrence's reference to "they." See Alexander v. State, 562 S.W.2d 207 (Tenn. Crim. App. 1977) (holding that substituting "my friend" in defendant's statement for co-defendant's name did not cure Bruton concerns because the identity of the co-defendant as "my friend" was evident); White v. State, 497 S.W.2d 751 (Tenn. Crim. App. 1971) (rejecting use of "the other person" in defendant's statement as acceptable reference to co-defendant).

The receipt of evidence, however, which implicates Bruton concerns may be harmless beyond a reasonable doubt based upon the strength of the other evidence against the defendant who is implicated by his co-defendant's statement. State v. Howard, 617 S.W.2d 656, 658 (Tenn. Crim. App. 1981). In this case, the trial court observed that it did not believe the jury would decide the case based upon a muttered statement by the witness that was later corrected. The court said that it believed the case turned upon whether the jury accepted that the event had happened as contended by the state. In other words, either the defendants were all guilty of an unjustified beating of the victim, or the defendants were justified in their actions because the victim was aggressive and acted in a way that threatened Mitchell Richardson. Aside from the testimony of Kenneth Lawrence about Amber Campbell's statement, the evidence includes the testimony of the victim that he was beaten by all four defendants and the testimony of Sharon Carmack that she received a telephone call during the beating in which she recognized the voice of the victim begging for mercy and the voice of Mitchell Richardson threatening the victim not to involve the police and telling someone else to stop the beating. As to defendant April Richardson, there is also the evidence of her statement to Elizabeth Nichols that she kicked and spit on the defendant. Given this other compelling evidence of the guilt of Mitchell Richardson, John Travis Richardson, and April Richardson, we hold that Lawrence's testimony about Campbell's statement was harmless beyond a reasonable doubt to the co-defendants. We conclude that the trial court did not abuse its discretion in denying the motion for severance.

Mistrial

The remaining question is whether the trial court should have granted a mistrial. Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This court will not disturb that decision unless there is an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim.

App. 1996). A manifest necessity exists when there is “no feasible alternative to halting the proceedings.” State v. Knight, 616 S.W.2d 593, 596 (Tenn. 1981).

As with the severance issue, Amber Campbell has no basis for a mistrial based upon the admission of her own inculpatory statement. There was no error in the admission of the statement against her, and it follows that there was no manifest necessity for the trial court to grant her a mistrial.

With respect to the remaining three defendants, they have not demonstrated a manifest necessity for a mistrial because, as discussed above, the challenged testimony of Kenneth Lawrence was harmless beyond a reasonable doubt. The trial court did not err in denying their motions for a mistrial.

III

The final issues relate to the trial court’s sentencing the defendants. Mitchell Richardson and John Travis Richardson complain of the length of the four-year-and-six-month sentences they received and of the trial court’s imposition of confinement in the Department of Correction. Amber Campbell and April Richardson complain of the ten-day jail service component of their sentences.

Mitchell Richardson and John Travis Richardson - Waiver

Both Mitchell Richardson and John Travis Richardson claim for the first time that the length of their sentences is excessive under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), which holds that any fact other than a prior conviction that is required to enhance a defendant’s sentence must be found by a jury beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. at 489 (2000) (same). The record reflects that the trial court enhanced these defendants’ sentences based upon the victim’s particular vulnerability due to his physical condition during the beating and that the defendants treated or allowed the victim to be treated with exceptional cruelty during the offense. See T.C.A. § 40-35-114(5), (6) (2003).²

We must consider whether the defendants waived the Blakely issue by failing to raise this challenge in the trial court. The defendants argue that they were sentenced in contravention of Blakely at the August 1 and 3, 2005 sentencing hearings because the trial court, rather than a jury, found the statutory enhancement factors. The federal courts have applied Apprendi and Blakely to all cases pending on direct review or not yet final. See United States v. Booker, 543 U.S. 220, 268 (2005). The problem for the defendants in this case is that both Apprendi and Blakely were decided before the defendants’ sentencing hearings took place. We conclude that the defendants failed to

²We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendants’ appeal. The defendants were sentenced after the change in the sentencing laws took effect, but the record does not reflect that the defendants signed a waiver of their ex post facto protections to be sentenced under the amended provisions. See T.C.A. § 40-35-210, Compiler’s Notes.

preserve their Blakely challenge when they did not raise it in the trial court. At the time of the sentencing hearing, they had the benefit of the Supreme Court's ruling in Apprendi and its refining of that rule's parameters in Blakely.

We acknowledge that before the defendants' sentencing, the Tennessee Supreme Court had ruled that Tennessee's sentencing law as it existed before June 7, 2005, did not run afoul of the Sixth Amendment concerns addressed in Blakely. See State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) ("Gomez I"), vacated and remanded by Gomez v. Tennessee, ___ U.S. ___, 127 S. Ct. 1209 (2007). The version of the sentencing law addressed in Gomez was the one under which the defendants were sentenced. After the defendants' sentencing, the United States Supreme Court issued Cunningham v. California, ___ U.S. ___, 127 S. Ct. 856 (2007). The Supreme Court then granted certiorari in Gomez v. Tennessee, vacated the judgment, and remanded the case to the Tennessee Supreme Court with instructions to reconsider it in light of Cunningham. Recently, the Tennessee Supreme Court held that in light of the dictates of Cunningham, Tennessee's pre-2005 sentencing statute violated the Sixth Amendment. State v. Gomez, 239 S.W.2d 733 (Tenn. 2007) ("Gomez II").

Although the defendants in the present case might arguably have been misled at the time of their sentencing by the majority opinion of our supreme court in Gomez I, the United States Supreme Court, rather than the Tennessee Supreme Court, is the final arbiter of questions concerning the federal Constitution, and the defendants' Blakely claim should have been raised at their sentencing hearing, Gomez I notwithstanding. As such, our review is limited to whether the trial court committed plain error in sentencing the defendants. Gomez II, 239 S.W.3d at 737. Rule 52(b) of the Tennessee Rules of Criminal Procedure provides:

(b) Plain Error. – When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.

See also T.R.A.P. 36(b). Our supreme court has adopted the factors developed by this court to be considered

when deciding whether an error constitutes "plain error" in the absence of an objection at trial: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the [proceedings],"

and “recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial.” Adkisson, 899 S.W.2d at 642.

In the present case, the transcript reflects that the trial court considered whether enhancement and mitigating factors applied and weighed them in arriving at a sentencing determination. It is likewise apparent that a clear and unequivocal rule of law was breached. See Gomez II, 239 S.W.3d at 740-41 (holding that application of enhancement factors other than fact of prior criminal convictions was breach of clear and unequivocal rule of law). It is also clear that substantial rights of the defendants were affected when they were denied their Sixth Amendment right to jury trial. See id. at 741. The record does not reflect waiver for tactical reasons. See id. at 741-42 (allowing plain error consideration where record did not reflect that defendant waived Blakely issue for tactical reasons). Finally, consideration of the issue is necessary to do substantial justice. See id. at 742. Neither Mitchell Richardson nor John Travis Richardson’s sentence was enhanced based upon a history of prior criminal convictions, and enhancement based upon the enhancement factors applied caused their sentences to be increased from the statutory presumption of three years to four years and six months. Thus, we must grant them plain error relief by reducing their Class C felony sentences to the presumptive sentences of three years.

Mitchell Richardson and John Travis Richardson - Manner of Service of Sentences

Mitchell Richardson and John Travis Richardson contend they should have been granted an alternative sentence, rather than incarceration in the Department of Correction. Appellate review of sentencing is de novo on the record with a presumption that the trial court’s determinations are correct. T.C.A. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his or her own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

When a defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony, the defendant is presumed to be a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). However, this presumption may be rebutted upon a showing that (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing T.C.A. § 40-35-103(1)(A)-(C)). The trial court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. T.C.A. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). In addition, a trial court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5); Boston, 938 S.W.2d at 438.

In the present case, the transcript reflects that the trial court properly considered the facts and circumstances of the case and the statutory principles in imposing incarcerative sentences on Mitchell Richardson and John Travis Richardson. Its determination is entitled to the presumption of correctness.

The trial court acknowledged the favorable work histories of these defendants and their lack of prior criminal convictions. The court had before it evidence of their family obligations, with both providing the sole support for their minor children. Despite these considerations, the court found that confinement was appropriate for these defendants in order to avoid depreciating the seriousness of the offense. See T.C.A. § 40-35-103(1)(B). In State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981), our supreme court stated that a trial court may deny an alternative sentence based upon this factor if the circumstances of the offense are “especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree.” The facts reflect that the victim was lured away from town by John Richardson and accosted by Mitchell Richardson, with the other defendants joining in administering a violent beating to the victim while the victim was helpless on the ground and was being attacked by four people. The victim was in so much pain that he begged for them to get a gun and take his life. Despite the victim having been severely beaten, these defendants did not summon medical help, with Mitchell Richardson leaving the victim alone outside his locked truck. The victim endured painful medical treatment and was left with permanent injuries, including scarring on his face, memory problems, and balance difficulties. The victim needs further medical care to correct the injury to his nose. These facts demonstrate that the circumstances of the offense were “especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an

excessive or exaggerated degree.” Id. at 534. The trial court properly denied alternative sentencing for Mitchell Richardson and John Richardson.

April Richardson and Amber Campbell - Denial of Total Probation

April Richardson and Amber Campbell argue that the trial court erred in imposing ten days of their ten-month sentences to be served in jail, rather than granting them total probation.

When imposing a misdemeanor sentence, the trial court is not required to conduct a sentencing hearing, but it must afford the parties a reasonable opportunity to address the length and manner of service of the sentence. T.C.A. § 40-35-302(a). The trial court must impose a specific sentence in terms of the months, days, or hours to be served. Id. at (b). Then, the trial court must set the percentage of the sentence that the defendant is to serve in incarceration before being considered for various rehabilitative programs. Id. at (d). We note that the law provides no presumptive minimum for misdemeanor sentencing. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Moreover, in misdemeanor sentencing, the trial court is not required to place specific findings on the record. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). However, the trial court must consider the purposes and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(d); see Troutman, 979 S.W.2d at 274 (holding that “while the better practice is to make findings on the record when fixing a percentage of a defendant’s sentence to be served in incarceration, a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute”). As with felony sentencing, appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court’s determinations are correct. T.C.A. §§ 40-35-401(d), -402(d).

We note, first, that the trial court complied with the statutory mandate for misdemeanor sentencing. The court was not required to make detailed findings on the record. Troutman, 979 S.W.2d at 274. The trial court’s observations reflect that it was mindful of the purposes and principles of the Sentencing Act. The court stated, “I think the issue in this case is the seriousness of the offense and the offense was extremely serious and I didn’t see any either instance did the women try to stop anything, they were just sort of there” As noted above, the circumstances of the offense were aggravated, and confinement was appropriate on this basis. The trial court properly ordered April Richardson and Amber Campbell to serve ten days in jail.

Based upon the foregoing and the record as a whole, the judgment of the trial court is affirmed in all respects except that we modify the sentences imposed on Mitchell Richardson and John Travis Richardson to three years.

JOSEPH M. TIPTON, PRESIDING JUDGE